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IN RE YAMAMOTO RYOJI & ANOR; PETITIONERS

HIGH COURT MALAYA, SHAH ALAM
HAYATUL AKMAL ABDUL AZIZ J
[DIVORCE PETITION NO: 33JP-109-02-2016]
30 JULY 2020

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FAMILY LAW: *Divorce – Domicile – Decree nisi – Setting aside – Whether both parties domiciled in Japan – Whether Malaysian court had jurisdiction to hear petition for divorce and to grant decrees – Whether fundamental legal requirement of domicile satisfactorily presented – Whether decrees irregularly obtained – Whether decrees a nullity and ought to be set aside – Law Reform (Marriage and Divorce) Act 1976, ss. 48(1), 49*

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The petitioner husband ('PH') and petitioner wife ('PW') were legally married on 15 January 2008 in Tokyo, Japan. On 11 February 2016, the parties jointly presented a joint petition for divorce at the Shah Alam High Court. On the hearing date of this petition on 18 March 2016, only PW was present in open court and an order for a *decree nisi* was granted and upon application by counsel, the *decree nisi* was made absolute immediately where after the required formalities had been complied with, the certificate of *decree nisi* absolute dated 25 March 2016 was issued. After approximately three years and eight months, on 20 November 2019, PH filed this application to set aside/strike out the said decrees over an allegation that this court had no jurisdiction to grant the said decrees. The PH's application was premised on the basis that both parties were domiciled in Japan at the time the said divorce petition was presented in the Shah Alam High Court in contravention of the relevant provision of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The issue that arose was whether this court had the jurisdiction to hear the joint petition and the power to grant the said decrees as the extent of the court's power to grant a decree of divorce is limited under s. 48(1) of the LRA to only where the domicile of parties to the marriage at the time when the petition was presented, was in Malaysia.

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Held (allowing PH's application):

(1) The law on setting aside a consent order is trite where once the consent judgment had been perfected, the parties are bound by it and the court is duty bound to enforce the agreed terms of the same. There are a plethora of cases that holds a consent order must rarely be disturbed unless there are exceptional circumstances that warrants the intervention of the court and the burden is on the applicant to prove on a balance of probabilities that the need to vary legally existed. (para 13)

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(2) In the present case, the parties were married in Japan in 2008 and resided in Japan with a child born in 2010. They lived temporarily in Malaysia from 2010 to 2013. PW by law, acquired a domicile in Japan upon her marriage to PH and in her affidavit she averred that she resided

and worked in Japan. In the circumstances as presented, the fundamental legal requirement of domicile was not satisfactorily presented to the court. Where there is no jurisdiction, the parties could not consent to the court having jurisdiction and such consent or waiver could never cure a lack of jurisdiction. (para 15)

(3) Jurisdiction does not originate in consent or acquiescence of the parties and could not be established; where it is absent, by such consent, acquiescence or waiver of rights. The joint petition was filed on 11 February 2016 when parties were residing in Japan. The parties were only in Malaysia at the time for the Chinese New Year holiday. Therefore, it was undisputed that the parties were not living in and/or domiciled in Malaysia at the time the joint petition was presented. An affirmation alone could not confer domicile. (para 15)

(4) PW was not able to satisfy the requirements of s. 49 of the LRA to salvage the said decrees, which was a legal requirement. No cogent evidence had been adduced as to any issue of desertion or abandonment. Similarly, no cogent evidence had been tendered to satisfy the court that PW had been resident in Malaysia for two years before the presentation of the joint divorce petition. In default thereof, s. 49 of the LRA was inapplicable in the present circumstances. The said decrees were irregularly obtained from this court which rendered it a nullity necessitating its setting aside as required by law. (para 20)

Case(s) referred to:

Abdul Razak Sheikh Mahmood & Ors v. Amanah Raya Bhd & Ors And Another Appeal [2018] 5 CLJ 273 CA ***(refd)***

Ang Geek Choo v. Wong Tiew Yong [1997] 3 CLJ Supp 201 HC ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Charnley v. Charnley And Betty [1959] 1 LNS 12 HC ***(refd)***

Chow Chuan Fat v. Yeo Chai Seng & Ors [2016] 1 LNS 1407 HC ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Joseph Wong Phui Lun v. Yeoh Loon Goit [1978] 1 LNS 76 HC ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC ***(refd)***

Khoo Kay Peng v. Pauline Chai Siew Phin [2014] 10 CLJ 403 HC ***(refd)***

Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors [2002] 6 CLJ 295 HC ***(refd)***

Lagenda Kencana Sdn Bhd v. Peter's Holding Sdn Bhd & Anor [2012] 3 CLJ 824 CA ***(refd)***

Macquarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor And Another Appeal [2007] 6 CLJ 176 CA ***(refd)***

Melvin Lee Campbell v. Amv Anak Edward Sumek [1988] 1 LNS 19 HC ***(refd)***

Neduncheliyan Balasubramaniam v. Kohila Shanmugam [1997] 4 CLJ 676 CA ***(refd)***
Ng Say Chuan v. Lim Szu Ling [2010] 10 CLJ 371 HC ***(refd)***
Pauline Chai Siew Phin v. Khoo Kay Peng [2014] 8 CLJ 571 CA ***(refd)***
Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v. Bagan Serai Housing Estate Sdn Bhd [2016] 8 CLJ 846 CA ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd [2005] 4 CLJ 345 FC ***(refd)***
Re Prasert Wongphattarakul & Anor [1997] 3 CLJ 87 HC ***(refd)***
Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Intervenors) [2003] 1 CLJ 465 HC ***(refd)***
Shinning Crest Sdn Bhd & Ors v. Malaysia Building Society Bhd [2018] 1 LNS 342 HC ***(refd)***
Siah Teong Woei v. Janet Traynor [2010] 3 CLJ 361 HC ***(refd)***
Teoh Ah Mooi v. Causeway Bay Plantations Sdn Bhd [2014] 5 CLJ 466 CA ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***
William Tan Guan Hock v. Khor Chai Heah [1990] 1 CLJ 895; [1990] 1 CLJ (Rep) 308 SC ***(refd)***
Wong Cheng Ping v. Chin Guan Seng [2010] 10 CLJ 743 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Divorce and Matrimonial Proceedings Rules 1980, r. 103
Law Reform (Marriage and Divorce) Act 1976, ss. 3(2), 48(1)(c), 49, 61
Rules of Court 2012, O. 18 r. 19, O. 42 r. 13, O. 92 r. 4

For the applicant/petitioner husband - YN Foo, Kiran Dhaliwal & Yu Yi Lin; M/s YN Foo & Partners
For the petitioner wife - Kevin Lee, Damien Chan & Carey Lee; M/s CL Lee & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Hayatul Akmal Abdul Aziz J:

Introduction

[1] This is an application (encl. 14) filed by the petitioner husband ("PH") against the petitioner wife ("PW"); according to s. 48(1) of Law Reform (Marriage and Divorce) Act 1976 ("the LRA"); Rule 103 of Divorce and Matrimonial Proceedings Rules 1980 ("DMPR 1980"); O. 18 r. 19 and O. 92 r. 4 Rules of Court 2012 ("RC 2012) and/or under the inherent jurisdiction of this court. Among the prayers is to set aside the *decree nisi* dated 18 March 2016 ("the said *decree nisi*") and the certificate of *decree nisi* absolute dated 25 March 2016 ("the said decree absolute"); referred collectively as "the said decrees" as well as a stay of the said decrees and other prayers pending the determination of this application.

[2] The relevant cause papers and written submissions are as follows:

(i) enclosure 14: The notice of application filed on 20 November 2019;

(ii) enclosure 15: PH's affidavit in support affirmed by Yamamoto Ryoji on 11 November 2019;

(iii) enclosure 22: PW's affidavit in reply affirmed by Chung Fei Teng on 31 January 2020;

(iv) enclosure 23: PH's affidavit in further reply affirmed by Yamamoto Ryoji on 17 March 2020;

Submissions/submissions in reply by PW and PH.

[3] This application was heard before me on 18 May 2020 and after perusing the cause papers filed, respective written submissions of the parties, I allowed the said application with a cost of RM3,000 granted to PH. My reasons are as follows.

Brief Facts

[4] From the cause papers, the facts briefly are as follows:

(i) PH and PW were legally married on 15 January 2008 in Tokyo Japan.

(ii) They are blessed with a daughter Yamamoto Kaede [(now 9+ years old) – ("the said child").

(iii) On 11 February 2016, the parties had jointly presented a joint petition for divorce at the Shah Alam High Court and they were represented by a similar counsel then.

(iv) On the hearing date of this petition on 18 March 2016, only PW was present in open court and an order for *decree nisi* was granted and upon application by learned counsel, the *decree nisi* was made absolute immediately where after the required formalities had been complied with, the certificate of *decree nisi* absolute dated 25 March 2016 was issued.

[5] After approximately three years and eight months, on 20 November 2019, PH filed this application to set aside/strike out the said decrees over an allegation that this court has no jurisdiction to grant the said decrees and other related prayers.

Submission By The Petitioner Husband (PH)

[6] Learned counsel for PH, submitted that they will only be submitting on the principal issue of jurisdiction, ie, did this court have the jurisdiction to hear the joint petition and the power to grant the said decrees. Learned counsel submitted that the extent of the court's power to grant a decree of divorce was limited under s. 48(1) of the LRA to only where the domicile of parties to the marriage at the time when the petition is presented, is in Malaysia.

[7] PH contended that:

(i) It is not disputed that parties were married in Japan on 15 January 2008 and resided in Japan.

(ii) On 25 October 2010, the said child was born.

(iii) Parties lived temporarily in Malaysia from year 2010-2013.

(iv) On 11 February 2016 the parties filed a joint petition for divorce in this court and on 18 March 2016 only PW was present in court when the *decree nisi* was granted which was made absolute immediately and on 25 March 2016 where the certificate of decree absolute was issued by this court. The said decrees were registered in Japan on 19 July 2016 by PW who had sought to register the said divorce in Japan.

(v) By end of November 2016, PH who had found out about the said divorce proceeding (to register the Malaysian divorce) filed by PW in Japan, had filed a suit on 9 June 2017 to set aside the said Japanese Divorce proceeding which is an ongoing lawsuit. The said lawsuit in Japan was subsequently put on hold pending the disposal of this application (encl. 14) in the Shah Alam High Court.

(vi) On 30 August 2017, PH proceeded to file a suit in Japan against PW's adulterer, and on 10 May 2018, a consent order was recorded in the Japanese court where damages of approximately RM60,000 were paid to PH as damages.

(vii) On 20 November 2019, PH filed this application to strike out the said decrees, premised on the basis both parties were domiciled in Japan at the time the said divorce petition was presented in the Shah Alam High Court in contravention of the relevant provision of the LRA. Learned counsel referred to s. 48 of the LRA which I reproduced as follows:

> 48. Extent of power to grant relief
>
> (1) Nothing in this Act shall authorise the court to make any decree of divorce except:
>
> (a) where the marriage has been registered or deemed to be registered under this Act; or
>
> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
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> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

(viii) It was argued that s. 48(1) of the LRA is worded to be mandatory before any proceedings may be heard by the court, it has to be satisfied that the domicile of both the parties must be in Malaysia at the time

the petition was presented. I was alluded to *Re Prasert Wongphattarakul & Anor* [1997] 3 CLJ 87 where the court recognised the mandatory nature of the said provision:

> Before a Court can exercise its jurisdiction to make a decree of divorce under the Act, the parties have to show that they as well as the marriage sought to be dissolved satisfy the mandatory requirements of s. 48(1) of the Act. They have to show either:
>
> (1) that the marriage has been registered or is deemed to be registered under the Act and that their domicile at the time of the presentation of the petition is in Malaysia; or
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> (2) that their marriage was contracted under a law providing that, or in contemplation of which, marriage is monogamous and that their domicile at the time of the presentation of the petition is in Malaysia

(ix) The court recognised that a wife acquired a domicile of her husband upon her marriage and as it is trite at common law, that it remained so throughout the subsistence of the marriage. This is given statutory recognition when s. 48(1)(c) of the LRA, requires the domicile of both parties to be in Malaysia before the court can entertain proceedings for a decree of divorce, otherwise the court is empowered to dismiss the joint petition pursuant to O. 18 r. 19 RC 2012, as well as in the exercise of its inherent power. In *Neduncheliyan Balasubramaniam v. Kohila Shanmugam* [1997] 4 CLJ 676 CA, held that upon marriage, any Malaysian woman will acquire her husband's domicile and until that marriage is lawfully dissolved, she will retain the domicile of her husband.

[8] It is not a matter of dispute that:

(i) PH is a Japanese citizen, who is domiciled in Japan. He was in Malaysia from 2010 to 2013, returning to live in Japan in 2013, three years before the divorce petition was filed. PW didn't deny this fact but merely claiming it to be irrelevant.

(ii) PW by law, had acquired a domicile in Japan upon her marriage to PH. In her affidavit (encl. 22), she averred that she resides and worked in Japan.

(iii) PH submitted this court has no jurisdiction to hear the said joint petition and/or determine the said decrees, and lack of jurisdiction could not be waived, consented to, or overcome by agreement of the parties. I was referred to *Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v. Bagan Serai Housing Estate Sdn Bhd* [2016] 8 CLJ 846 CA, where it was held that lack of jurisdiction could not be waived, consented to, or overcome by agreement of the parties. In a case where the court has no jurisdiction, it could not confer jurisdiction upon itself

by the consent of or waiver of the parties. In *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153 FC, it was held that:

> Jurisdiction, it is often said, does not originate in consent or acquiescence of the parties and could not be established, where it is absent, by such consent, acquiescence or waiver of rights.

(iv) It was further argued that the petition presented before this court was a joint divorce petition, it could not cure the legal position when the court had no jurisdiction to hear the said petition, since the mandatory requirement of domicile was not satisfied. The joint petition was filed on 11 February 2016 when parties were residing in Japan. The parties were only in Malaysia at the time for the Chinese New Year holiday (not denied by PW). Therefore, it is undisputed that the parties were not living in and/or domiciled in Malaysia at the time the joint petition was presented on 11 February 2016.

(v) As for the issue of delay, as raised by PW, PH in his reply said that the challenge raised by PH is jurisdictional and therefore it can be raised at any time (see *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* (*supra*).

(vi) The court may at any stage of the proceedings order to be struck out an action or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or the endorsement, on the ground that it discloses no reasonable cause of action or defense.

In *Re Prasert Wongphattarakul* (*supra*) the court had relied on both, O. 18 r. 19 RC 2012 and in the exercise of its inherent power to dismiss the joint petition:

> ... I was constrained, in the exercise of the powers of the Court under O. 18 r. 19, and also in the exercise of its inherent powers as preserved by O. 92 r. 4, of the Rules of the High Court 1980 to dismiss the petition as disclosing no reasonable cause of action and also as an abuse of the process of the Court as the petition was bereft of any pleading containing the necessary facts to found jurisdiction to entertain these proceedings for a decree of divorce.

(vii) Anchored on the principles in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 SC, PH argued that, since the parties were not domiciled in Malaysia, the court has no jurisdiction to entertain and determine the said joint petition. This is a plain and obvious case that warrants it to be struck out as an abuse of the process of the court.

(viii) Order 92 r. 4 RC 2012 provides that the inherent power of the court is preserved:

> For the removal of doubt, it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 made it clear that:

> Apart from the breach of natural justice, in an attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened any written law, the contravention should be one which defies a substantive statutory prohibition to render the defective order null and void on the ground of illegality or lack of jurisdiction.

The legal position is settled that where an order of the court has not been regularly obtained, any party is entitled as of right to have it set aside, ie, *ex debito justitiae*, irrespective of the merits and without any terms. Such power of court is inherent and need not be derived from any statutory provision.

[9] On the issue raised by PW that PH had affirmed in his affidavit in the said joint petition that parties were domiciled in Malaysia, PH argued that:

(i) An affirmation alone cannot confer domicile to establish that he had abandoned his domicile of origin and acquired a domicile of choice in Malaysia (See: *Joseph Wong Phui Lun v. Yeoh Loon Goit* [1978] 1 LNS 76; [1978] 1 MLJ 236).

(ii) In *Re Prasert Wongphattarakul* (*supra*), reference was made of *Melvin Lee Campbell v. Amv Anak Edward Sumek* [1988] 1 LNS 19; [1988] 2 MLJ 338 as authority to say that the foreign husband's affirmation *vide* an affidavit as to his domicile of choice in Malaysia was insufficient to discharge the heavy burden of proving his abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia.

(iii) In *Re Prasert Wongphattarakul* (*supra*), the court on its motion, enquired into the jurisdictional basis of the joint petition and struck it out as there was no evidence that the husband, a Thai National, was domiciled in Malaysia.

(iv) Accordingly, PW's contentions in her submissions that no police report was lodged, no complaint to the Bar Council was made and there were no impeachment proceedings, are irrelevant to the jurisdictional issue at hand.

(v) The only issue of relevance is whether the facts of this case show that the parties were domiciled in Malaysia at the time the petition was presented.

(vi) It is trite that consent or waiver of the parties can never cure a lack of jurisdiction. See Federal Court in *Asia Pacific (supra*), where jurisdiction does not originate in consent or acquiescence of the parties and could not be established, where it is absent, by such consent, acquiescence or waiver of rights.

(vii) The issue of inordinate delay of three years eight months in filing this application does not arise where jurisdiction is an issue.

Submission By The Petitioner Wife

[10] In contrast, PW argued that:

(i) The petitioners were married in 2008 before the Registrar of Marriage, at the Commission of Malaysia in Tokyo, Japan.

(ii) During the marriage, they were residing in Malaysia.

(iii) They filed the joint petition in 2016 where a translated version in English had been attached to the said petition. In the joint petition, PH confirmed the following:

(b) The petitioners were residing in Malaysia for 2 years before the commencement of the divorce proceeding.

(b) They agreed to jointly dissolve the marriage with agreed terms.

(c) PH is not required to provide any maintenance to the Petitioner Wife who will bear the legal costs of the divorce proceeding.

(iv) The application to set aside the said decrees was filed after three years eight months on the ground of non-domicile for two years, before the commencement of divorce proceedings.

(v) PH has not filed any proceedings to impeach the joint petitioner which was affirmed by himself. Neither did he lodge any police report complaining to the authority that the joint petition was not signed by him or he was not aware of the joint petition.

(vi) As it stands, the joint petition is valid in law and should be binding on the parties.

(vii) According to PH, he is Japanese who is English and Bahasa Malaysia illiterate and does not understand the contents of what he signed in 2016.

(viii) This version is disputed since PH at all material times in communication with PW and her family members in English.

(ix) PH alternative ground that he does not know of the divorce proceeding cannot hold.

(x) There is no reason proffered by PH for the inordinate delay in filing this application and therefore it ought to be dismissed *in limine*.

(xi) The joint petition which confirms that the petitioners' domicile is in Malaysia, and therefore valid in law.

(xii) PH's allegation that this court has no jurisdiction to issue the said decrees is misplaced in law and fact. His allegation that he was not aware of the proceeding was untrue and it is not a ground to set aside the said decrees.

(xiii) It is trite law that the application to set aside the absolute *decree nisi* or consent order must be made within 30 days according to O. 42 r. 13 of RC 2012. In *Wong Cheng Ping v. Chin Guan Seng* [2010] 10 CLJ 743, it was held that s. 61 of the LRA is the written law for the specific purpose of providing for the status of a *decree nisi* that has been granted by the court under LRA and it provides the rule or procedure for rescinding or setting aside the *decree nisi* in a situation where no application has been made to make the *decree nisi* absolute.

(xiv) In this case, the *decree nisi* was granted on 22 July 1999 and made absolute by the certificate dated 21 October 1999. There is no provision in the LRA for rescinding or setting aside a *decree nisi* that already has been made absolute. It appears that Parliament intends to preserve the integrity and finality of a *decree nisi* that already has been made absolute after three months. As such, parties are not allowed to freely apply to the court at any time to rescind or set it aside unless for very good reasons or in exceptional circumstances.

(xv) PW submitted that this court has inherent jurisdiction to set aside *decree nisi* but such discretion must be exercised having regard to other factors, namely the limitation of filing the present application. In this case, PH blatantly disregard the inordinate delay and refused to provide cogent reasons for it.

(xvi) Setting aside the *decree nisi* is equivalent to setting aside the consent order. See *Shinning Crest Sdn Bhd & Ors v Malaysia Building Society Bhd* [2018] 1 LNS 342, where the High Court held that the unexplained delay of nine months is an inordinate delay and the originating summons ought to be dismissed *in limine*.

(xvii) The issue before this court is whether, without any impeachment proceeding or specific relief sought to declare the joint petition null and void, this court is entitled to take into account the subsequent affidavit in setting aside the absolute *decree nisi*.

(xviii) The joint petition was signed by the petitioners and solicitors for petitioners, it is deemed valid and enforceable in law.

(xix) The argument is reinforced by the fact that PH affirmed an affidavit praying that his present to be dispensed within the divorce proceeding.

(xx) This leads to two inferences. First, PH is fully aware of the entire proceeding which is to be read with the communication between him and PW's sister *via* Facebook. Second, the affidavit infers that the content of the joint petition is correct and be binding on him.

(xxi) Further, the affidavit supporting the petition was affirmed by PH himself. In *Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors* [2002] 6 CLJ 295; [2002] 2 MLRH 55, it was held:

> It is quite apparent that below the jurat at the right-side bottom there is a signature and a rubber stamp of a commissioner for oaths. It does not say that the commissioner for oaths had taken the oath before interpreting as required under Form (d). Affirming an affidavit is a serious matter. This court acts on the affidavit as alluded to in enclosure 70 to decide the fate of enclosure 71. There was no mention at all by the counsel who acted for the plaintiff on 10 January 2002 that the affidavit in enclosure 70 contained crucial defect of the kind as alluded to by the learned counsel for the first and the third defendants. It is trite law that the court receives evidence through the affidavit provided the affidavit is properly sworn or affirmed. I venture to say that affirming an affidavit takes with it some measure of responsibility. The deponent of an affidavit must be fully satisfied that the affidavit that he is deposing complies strictly with the rigors of the law ...

[11] PW further argued that:

(i) Under the joint petition dated 11 February 2016, it was stated that they were residents in Malaysia and have been domiciled with residence in Malaysia for more than two years before the commencement of this proceeding. This petition was signed by both parties.

(ii) No allegation was made stating that the signature of PH was forged.

(iii) In the circumstances, there is nothing wrong for this court to act on the joint petition and to grant the said decrees.

(iv) After three years and eight months, PH now comes to this court and submits that this court has no jurisdiction to give decree because his domicile is not in Malaysia.

(v) If this is allowed, it will open the floodgate of litigation to set aside the absolute decree irrespective of whether the change of story is correct or not in the first place.

(vi) This setting aside application is an application by which the parties are not allowed to cross-examine the deponent. Hence, this court needs to regard PH's affidavit about the change of his version on domicile with caution.

(vii) It is submitted that by signing the joint petition, this court has acted upon it and PH is, therefore, is estopped from stating that this court has no jurisdiction after three years and eight months. All the cases cited by PH are distinguishable from the fact that the challenge of the petition was taken before the decree was made. However, in the present case, the decree was made and is final. The facts of this case do not fall within the ambit of exceptional circumstances.

(viii) This court has jurisdiction in the circumstances to grant the said decrees according to s. 49 of LRA which provides as follows:

> Additional jurisdiction in proceedings by a wife
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> S. 49. (1) Notwithstanding anything to the contrary in paragraph 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this Part, although the husband is not domiciled or resident in Malaysia if:
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> (a) the wife has been deserted by the husband, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or
>
> (b) the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.
>
> (2) In any proceedings in which the High Court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia.
>
> (3) In this section references to deportation from Malaysia shall be construed as including banishment or expulsion under any written law.

(ix) In *Siah Teong Woei v. Janet Traynor* [2010] 3 CLJ 361, it was ruled that the High Court is conferred with additional jurisdiction under s. 49 of the LRA to provide exceptions to the 'domicile test'. These exceptions are granted to a wife to avoid the injustices upon the application of the principle that a wife does not have and cannot acquire a separate domicile of choice. This is provided in cases where the proceedings for divorce are commenced by a wife and not by a husband.

(x) In the *Law Reform (Marriage and Divorce Act) 1976, Commentary and Cases* by Nuraisyah Chua Abdullah, 2nd edn, the learned author commented that s. 49 of the LRA is an exception to the general rule that only parties who are domiciled in Malaysia may file a petition, be it contested or joint for divorce. However, this exception applies

only in cases where the petition is filed by the wife (and not by a husband). If the marriage breaks down, and as a consequence, the wife returns to Malaysia, she may then file proceedings for divorce after residing in Malaysia for two years.

(xi) In the present case, PH did not even proffer any explanation of why the delay in applying to set aside the said decrees.

(xii) Those cases that the applicant can raise the jurisdiction are distinguishable from the present case because this case is concerning the absolute decree which is mutually agreed by the parties.

The Law

[12] Section 61 of the LRA provides, as follows:

61. *Decree nisi* and proceedings thereafter.

(1) Every decree of divorce shall in the first instance be a *decree nisi* and shall not be made absolute before the expiration of three months from its grant unless the court by general or special order from time to time fixes a shorter period.

(2) Where a *decree nisi* of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court and on that application, the court may:

(a) notwithstanding the provisions of the last foregoing subsection, make the decree absolute;

(b) rescind the *decree nisi*;

(c) require further inquiry; or

(d) otherwise deal with the case as it thinks fit.

Rule 103 Divorce and Matrimonial Proceedings Rules 1980 ("DMPR"), provides:

The Court may at any time order that any scandalous, irrelevant, vexatious, oppressive, argumentative or prolix document or matter in any document, be struck out and may award costs of any application in that behalf.

Order 18 r. 19 RC 2012 provides:

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defense, as the case may be;

(b) it is scandalous, frivolous or vexatious.

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Order 92 r. 4 RC 2012 provides inherent power to the court to prevent injustice:

For the removal of doubt, it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Findings Of This Court

[13] The law on setting aside consent order is trite where once the consent judgment had been perfected, the parties are bound by it and the court is duty-bound to enforce the agreed terms of the same. There are plethora of cases that holds a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court and the burden is on the applicant to prove on balance of probabilities that the need to vary legally existed. In the case of *Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371 where Yeoh Wee Siam J held that a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. In *Badiaddin v. Arab Malaysian Finance Berhad* (*supra*), the Federal Court held that it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. In *Abdul Razak Sheikh Mahmood & Ors v. Amanah Raya Bhd & Ors And Another Appeal* [2018] 5 CLJ 273, Court of Appeal held:

The law on setting aside consent judgment is more than settled and it is this. A consent judgment is only recorded when the respective litigants had agreed in writing as to how to resolve a legal suit. Once the consent judgment had been perfected, the parties are bound by it and the Court is duty bound to enforce the agreed terms of the same. The Court cannot vary any of the agreed terms unless with the mutual consent of the parties. Hence, one can say that the Court is *functus officio* or in other words, the Court is bereft of jurisdiction to entertain any request to set aside such judgment.

[14] The law on setting aside consent order and/or variation of such order is legally settled:

(i) Once the consent judgment had been perfected, the parties are bound by it and the court is duty-bound to enforce the agreed terms between the parties.

(ii) There are a plethora of authorities that hold a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court.

(iii) The burden is on the applicant to prove on the balance of probabilities that exceptional circumstances are present to justify the court's intervention (see *Ng Say Chuan v. Lim Szu Ling* (*supra*); *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 AMR 909; [1996] 1 MLJ 761 SC; *Badiaddin v. Arab Malaysian Finance Berhad* (*supra*)

(iv) The Court of Appeal in *Macquarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor And Another Appeal* [2007] 6 CLJ 176; [2007] 6 AMR 188 CA; [2007] 7 MLJ 139 CA, in consonance with the findings of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, FC; *Badiaddin v. Arab Malaysian Finance Berhad* (*supra*) and *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia & Ors (Intervenors)* [2003] 1 CLJ 465; [2003] 1 AMR 439; [2003] 1 MLJ 251; *Chow Chuan Fat v. Yeo Chai Seng & Ors* [2016] 1 LNS 1407; [2017] 1 AMR 676; that the jurisdiction to set aside such a judgment is not to be exercised as a matter of course but in limited circumstances. It is only to be used where:

(a) Breach of the rules of natural justice;

(b) Lack of jurisdiction;

(c) Illegality, ie, contravention of a substantive statutory provision;

(d) Serious defects; or

(e) Fraud

The burden lies on the applicant to satisfy the court that the matter comes within any of the ambit of those aforesaid circumstances.

(v) As for the issue of delay in complying with O. 42 r. 13 RC 2012 (setting aside/varying judgment and orders), the Federal Court had suggested that delay is never fatal in cases where the judgment obtained in irregular as to render it a nullity (see *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 AMR 215; [1996] 1 MLJ 30 FC; *Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345; [2006] 6 AMR 105; [2006] 5 MLJ 21 FC); time is not a bar to an application to set aside a judgment that is so fundamentally flawed and/or illegally and/or irregularly obtained. This is further amplified in the Court of Appeal ruling in *Teoh Ah Mooi v. Causeway Bay Plantations Sdn Bhd* [2014] 5 CLJ 466; [2014] 1 MLJ 263, CA; that where an order of the court is a nullity, an application can

be made to set it aside at any time. Judgment in default obtained 12 years prior was set aside as being a nullity (see also *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37, FC).

(vi) In *Lagenda Kencana Sdn Bhd v. Peter's Holding Sdn Bhd & Anor* [2012] 3 CLJ 824, CA; the Court of Appeal ruled that the issue of grave injustice is an important consideration in an application to set aside a consent order. If it can be shown that the said judgment/order had caused grave injustice to the aggrieved party, then such judgment/order may be set aside.

(vii) The legal position is settled that where an order of the court has not been regularly obtained, any party is entitled as of right to have it set aside, ie, *ex debito justitiae*, irrespective of the merits and without any terms. Such power of court is inherent and need not be derived from any statutory provision.

[15] In the present case, it is not in dispute that parties were married in Japan on 15 January 2008 and resided in Japan with a child born on 25 October 2010. They lived temporarily in Malaysia from year 2010-2013. PH (a Japanese national) was not present when the said decrees were pronounced in court since both parties are supposedly represented by a similar solicitor then. The said decrees were attempted to be registered in Japan on 19 July 2016 by PW who had sought to register the said divorce in Japan. By end of November 2016, PH who found out about the said attempt, applied to set aside the said Japanese divorce proceeding which had been stayed pending the disposal of this application (encl. 14) in the Shah Alam High Court. On 10 May 2017, a consent order against PW's adulterer was recorded in the Japanese court where damages of approximately RM60,000 was paid to PH as damages for adultery. PH had also filed this application to strike out the said decrees, premised on the basis both parties were domiciled in Japan at the time the said divorce petition was presented in the Shah Alam High Court in contravention s. 48(1)(c) of the LRA. On the issue of domicile/jurisdiciton, PW merely claimed it is now irrelevant. PW by law, acquired a domicile in Japan upon her marriage to PH. In her affidavit (encl. 22), she averred that she resides and works in Japan. In the circumstances as presented, the fundamental legal requirement of domicile was not satisfactorily presented to the court. Where there is no jurisdiction, the parties cannot consent to the court having jurisdiction and such consent or waiver can never cure lack of jurisdiction as ruled by the Court of Appeal in *Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v. Bagan Serai Housing Estate Sdn Bhd* (*supra*). In *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* (*supra*), the Federal Court had ruled that jurisdiction does not originate in consent or acquiescence of the parties and could not be established, where it is absent, by such consent, acquiescence or waiver of rights. The joint petition was filed on 11 February 2016 when

parties were residing in Japan. The parties were only in Malaysia at the time for the Chinese New Year holiday (not denied by PW). Therefore, it is undisputed that the parties were not living in and/or domiciled in Malaysia at the time the joint petition was presented on 11 February 2016. As rightly pointed out that an affirmation alone cannot confer domicile (see *Re Prasert Wongphattarakul* (*supra*), reference was made of *Melvin Lee Campbell v. Amv Anak Edward Sumek* (*supra*) as authority to say that the foreign husband's affirmation *vide* an affidavit as to his domicile of choice in Malaysia was insufficient to discharge the heavy burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia).

[16] PW had sought reliance on s. 49 of the LRA in the hope to salvage the said decrees from being set aside, in the application of additional jurisdiction in proceedings by a wife, as follows:

> S. 49. (1) Notwithstanding anything to the contrary in paragraph 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this Part, although the husband is not domiciled or resident in Malaysia if:
>
> (a) the wife has been deserted by the husband ...; or
>
> (b) the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.
>
> (2) ...
>
> (3) ...

The Issue Of Domicile And Additional Jurisdiction In Proceedings By A Wife Under Section 49 Of The LRA

[17] Section 3(2) of the LRA provides that, for the Act, a citizen in Malaysia is deemed to be domiciled in Malaysia unless the contrary is proved. But the LRA nor the Interpretation Acts 1948 and 1976 does not define the term "domicile". Therefore, s. 3 of the Civil Law Act 1956 operates to apply English common law, prevailing as at 7 April 1956. It states that save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered or in force in England on the 1 April 1956. There are three categories of domicile, namely of origin, of choice, and matrimonial. An individual has to express a conscious election to acquire a domicile of choice. Applying English common law, a married woman acquires her husband's domicile during the subsistence of the marriage which has been accorded statutory recognition in s. 48(1)(c) of the LRA. This domicile of dependence/marriage was affirmed in *Charnley v. Charnley And Betty* [1959] 1 LNS 12; [1960] 1 MLJ 29, where it was held that this domicile of a married woman is that of her husband while the marriage subsists, even though the parties may be living apart.

[18] In *William Tan Guan Hock v. Khor Chai Heah* [1990] 1 CLJ 895; [1990] 1 CLJ (Rep) 308; [1990] 1 MLJ 422, the Supreme Court ruled that at the time of the presentation of the petition, parties have to be domiciled in Malaysia. The petitioners would still have to prove and satisfy the court that both parties were domiciled in Malaysia at the time when the petition was presented before the court could exercise its powers under s. 48 of the LRA to grant any relief to the parties. The burden of proof required is found in *Joseph Wong Phui Lun v. Yeah Loon Goit* [1978] 1 LNS 76; [1978] 1 MLJ 236, where it ruled that it must be one beyond a mere balance of probabilities. Clear evidence is required to establish a change of domicile. In particular, to displace a domicile of origin in favor of the domicile of choice. The distinction in the concepts of domicile and nationality was addressed in *Ang Geek Choo v. Wong Tiew Yong* [1997] 3 CLJ Supp 201; [1997] 3 MLJ 467, where it ruled that the concept of nationality and the issue of domicile are two different concepts which deserve separate considerations. A person may change his place of domicile but yet not be divested of his nationality. In *Melvin Lee Campbell v. Amy Anak Edward Sumek* (*supra*), the court considered whether parties were of Malaysian domicile on a divorce petition presented by an American husband and a Sarawak native (Malaysian). The husband asserted that he had abandoned his domicile of origin and acquired a Malaysian domicile of choice, having lived in Malaysia for more than ten years before the presentation of the joint petition. Apart from his residence, the court considered the fact that the husband had neither bought any property nor made any actual investments in Malaysia, and that his previous business inquiries were exploratory. The court viewed the evidence and was not satisfied that his domicile of origin had been abandoned.

[19] To mitigate the harshness of the domicile rule to the female spouse, s. 49 of the LRA was legislated to allow some leeway to the rule on domicile that only parties domiciled in Malaysia may file a divorce petition be it single or joint. The wife would be able to commence proceedings although the husband is no longer domiciled or resident in Malaysia at the time when the petition is presented. This is however conditional upon that the wife being resident in Malaysia for two years immediately preceding the commencement of the proceedings; and the husband must have been domiciled in Malaysia before the act of desertion or deportation. This section also applies equally to such a wife who has not undergone any change in her Malaysian domicile because the parties to the marriage were domiciled in Malaysia at the time of marriage but now faces a possible change in her domicile of dependence as her husband has acquired a domicile of choice in another country. The issue of domicile is presently an issue of contention in *Khoo Kay Peng v. Pauline Chai Siew Phin* [2014] 10 CLJ 403, HC which ruled in favor of the husband on issue of the context of s. 48 of the LRA on

domicile and forum to determine the divorce of the parties as opposed to the United Kingdom where the wife allegedly stays. However, the Court of Appeal in *Pauline Chai Siew Phin v. Khoo Kay Peng* [2014] 8 CLJ 571, CA, held:

> (4) In determining encl. 6 (stay application by the wife), there was no necessity to resolve the jurisdiction and domicile issues. The two enclosures should not have been heard together. By doing so, the judge may have been misled into believing that the resolution of the aforesaid issues were required bearing in mind that submissions by counsel on both enclosures were made simultaneously. The judge should have embarked on a full trial to determine the jurisdiction and domicile issues on the ground that the affidavit evidence gave rise to many disputes of facts and law. A full trial was necessary to determine the issues of jurisdiction and domicile. …
>
> (5) … The judge should not have deliberated on encl. 1 by way of the affidavit evidence but by way of a full trial where parties were subject to cross examination. Enclosure 1 was to be remitted to High Court before another judge to be tried by way of a full trial. The judge's finding on the issues of jurisdiction and domicile should be set aside.

The Court of Appeal allowed the appeal against the husband's application but dismissed the wife's appeal on staying the proceeding to allow her divorce proceeding in the United Kingdom to conclude. The issue of domicile and forum were remitted back to the High Court before a different presiding judge to consider and determine after a full trial rather than by way of affidavit evidence. The Federal Court in 2016 however, had denied Pauline Chai Siew Phin's leave application to appeal against the Court of Appeal's decision.

[20] In the present case, PW had argued on s. 49 of the LRA to salvage the said decrees, it is my finding that she had not been able to satisfy the requirements of the said section which is a legal requirement. No cogent evidence had been adduced as to any issue of desertion or abandonment. Similarly, no cogent evidence had been tendered to satisfy the court that PW had been resident in Malaysia for two years before the presentation of the joint divorce petition. In her affidavit, she had averred that she resides and works in Japan. In default thereof, I find s. 49 of the LRA is inapplicable in the present circumstances. Considering the foregoing, I hold that the said decrees were irregularly obtained from this court which renders it a nullity which necessitates its setting aside as required by law.

Conclusion

[21] In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed PH's application (encl. 14) with a cost of RM3,000 granted to PH.